

Denied benefits to RN who was fired for repeatedly stealing for his own use controlled substances prescribed to patients in the hospital where he worked. Board distinguished this misconduct from that attributable to alcoholism. This case concerns drugs which may not be legally possessed without proper medical authorization. Claimant's fear of being discharged for reporting his addictive problems showed that he knew what he was doing and was aware of the risk.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lt. Governor

SUZANNE M. BUMP
Secretary, Labor and
Workforce Development

Board Of Review Decision

JOHN A. KING ESQ.
Chairman

DONNA A. FRENI
Member

SANDOR J. ZAPOLIN
Member

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to grant benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from employment on August 27, 2008. He filed a claim for unemployment benefits with the DUA and was found eligible in a determination issued by the agency on November 14, 2008. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner affirmed the agency's initial determination and allowed the claimant benefits in a decision rendered on December 18, 2008. In that decision, the review examiner concluded that the claimant suffered from drug and alcohol dependencies; and that such dependencies caused his discharge. Since the claimant was making a sincere effort to overcome his dependencies at the time of the hearing, the review examiner determined that the claimant became separated from employment due to an urgent, compelling, and necessitous reason that rendered his separation involuntary, under G.L. c. 151A, § 25(e)(1).

After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the employer's appeal, we accepted the case for review. Both parties were invited to present their reasons for agreeing or disagreeing with the review examiner's decision. Both responded within the time allowed. Our decision is based upon our review of the entire record, including the decision below and the parties' submissions.

The issue on appeal is whether the claimant left employment for such an urgent, compelling, and necessitous reason that it rendered his separation involuntary.

Findings of Fact

The DUA review examiner's findings of fact are set forth below in their entirety:

1. The claimant was employed as a full time registered nurse for the employer, a hospital. The claimant began work on 07/21/06 and became separated from work on 8/27/08.
2. The claimant was discharged for violating the employer's drug and alcohol policy.
3. The employer discharged the claimant after an investigation revealed a discrepancy on drugs administered by the claimant to patients assigned to his care.
4. The claimant has a drug and alcohol abuse problem.
5. The employer maintains a drug and alcohol policy. As per the policy, the employer expects: employees to remain free of the influence of alcohol and drugs while they are on the job and to refrain from use or unlawful manufacture, distribution, sale, dispensing, or possession while on hospital property or performing hospital business.
6. The policy is posted online and all employees are required to read and follow the policy. Employees in violation of this policy are subject to immediate termination based on the nature and severity of the violation.
7. The employer maintains this policy to provide an environment that is free of impairment related to the abuse of drugs and alcohol by any of its employees and to comply with law.
8. On 7/15/08, one of claimant's assigned patients reported that the claimant had only given him a portion of the prescribed medication he was required to take. The patient was schedule to receive seven (7) pills and the claimant gave the patient only five (5).
9. The patient's report prompted an investigation regarding the claimant's medication administration.

10. The investigation revealed other discrepancies such as undocumented narcotics waste or lack thereof. There were other occurrences where the amount of medication administered to the patients did not match the amount recorded on employer's drug dispenser.
11. On 8/26/08, the employer had a meeting with the claimant to go over the investigation findings. During the meeting the claimant admitted to using the prescribed medication for his own personal use. He admitted he had an alcohol and drug dependency.
12. The employer immediately discharged the claimant for violating its policy.
13. The claimant had not previously reported his alcohol and drug problem to the employer because he feared the same.
14. The claimant's license as a registered nurse has been suspended by the Massachusetts Board of Nursing due to his alcohol and narcotics dependency. He is working with the board of nursing on how to obtain the necessary help to treat his illness by attending the nursing substance abuse rehabilitation program.
15. The claimant is attending alcohol anonymous meetings three times per week. He is also attending therapy sessions with a therapist trauma specialist.

Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner based her decision on the following portion of G.L. c. 151A, § 25(e):

... An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The DUA recognizes alcoholism as a disease. Section 1216(G) in the DUA's Service Representatives' Handbook provides as follows:

A claimant is separated from employment due to an alcohol-related incident, either on the job or causing an absence from work. If the claimant admits that he or she is an alcoholic, or presents a physician's statement or other evidence that he

or she has been treated for alcoholism, and is making a sincere effort to overcome the alcoholism, then separation from work will not be subject to disqualification pursuant to §25(e)(1) of the Law. Such leaving will be considered an involuntary separation.

The Board agrees with this section. Were this a situation where the claimant was discharged for an alcohol-related incident, the employer would have the burden of proving that the employee had control of his alcoholism or that he deliberately and wilfully refused to accept help in controlling it. See Shepherd v. Director of the Div. of Employment Sec., 399 Mass. 737 (1987).

However, the fact that the claimant in this case was an alcoholic had no bearing on the misconduct resulting in his discharge. He was not fired for an alcohol-related incident. Rather, the review examiner found that the claimant was terminated because he was found to have engaged in a practice of repeatedly stealing controlled substances that had been prescribed for patients at the hospital where he worked in order to use them himself.

In our view, this case is distinguishable from Shepherd. While Shepherd dealt with abuse of alcohol, a legally available substance, this case concerns controlled drugs which may not legally be possessed without proper medical authorization.

Nonetheless, since the employer discharged the claimant, it still bears the burden of proving that the claimant should be disqualified from benefits. G.L. c. 151A, § 25(e)(2), provides, in relevant part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for ... the period of unemployment next ensuing ... after the individual has left work ... (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to ... a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence,...

We think that the employer has met its burden.

The dispositive issue in this case is the claimant's state of mind at the time he committed the policy violation. To be a knowing violation at the time of the act, the employee must have been "[C]onsciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Commissioner of Employment and Training, 423 Mass. 805, 813 (1996).

We know that the claimant was aware of the employer's policy, because he admitted to violating it. His fear of being discharged for reporting his additive problems further supports that he both knew what he was doing and was fully aware of the risk. Nothing in the record indicates otherwise. Therefore, we conclude as a matter of law that the claimant engaged in a knowing violation of a reasonable and uniformly enforced employment policy under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending September 13, 2008 and subsequent weeks, until he has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

/s/

Sandor J. Zapolin
Member

*** CONCURRING OPINION ***

I join member Zapolin in the opinion, but write separately to clarify my views on another aspect of the case.

To my way of thinking, this case is distinguishable from Shepherd, 399 Mass. 737, on two entirely independent grounds. First, and most obviously, as the opinion indicates, Shepard dealt with abuse of alcohol, a legally available substance, but the present case concerns controlled drugs.

However, perhaps even more importantly, I do not read Shepherd as immunizing workers who are afflicted with the disease of substance dependency from the effects of all forms of their own misbehavior, however egregious it may be. The facts of the Shepherd case concerned what might be characterized as relatively innocuous "sins of omission" by the employee, consisting of absenteeism and lateness which do not appear on their face to be intentional misdeeds and which could readily be attributed to the alcoholic claimant's diminished ability to manage his daily routines. Id. at 738-39. They did not involve repeated, premeditated, and artfully concealed thefts such as we find in the case at hand.

I simply do not believe that the Supreme Judicial Court intended the Shepherd decision to be used as a shield by those who engage in intentional, premeditated, illegal acts of a serious nature, be they in the form of theft, assault, or other major crimes against persons or property.

BOSTON, MASSACHUSETTS

DATE OF MAILING - July 31, 2009

/s/

John A. King, Esq.
Chairman

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – August 31, 2009

AB/rh